Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs

2008

Denise Staley v. Northern Utah Healthcare Corporation, dba St. Mark's Hospital : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2

 Part of the Law Commons

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.
Eric P. Schoonveld; Jennifer Ries-Buntain; Hugh C. Griffin; Mark A. Riekhof; Hall Prangle and Schoonveld; Attorneys for Appellant.
David A. Cutt; Eisenberg and Gilchrist; Attorneys for Appellee.

Recommended Citation
Brief of Appellant, *Staley v. Northern Uta Healthcare Corporation*, No. 20080492.00 (Utah Supreme Court, 2008).
https://digitalcommons.law.byu.edu/byu_sc2/2808

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH SUPREME COURT

DENISE STALEY Plaintiff/Appellee, v. NORTHERN UTAH HEALTHCARE CORPORATION, d/b/a ST. MARK'S HOSPITAL Defendant/Appellant	Utah Supreme Court No.: 20080492-SC Trial Court No.: 050916251

BRIEF OF APPELLANT

APPEAL FROM A DECISION OF THE THIRD JUDICIAL DISTRICT COURT HONORABLE KATE TOOMEY

Eric P. Schoonveld, #10900
Jennifer Ries-Buntain, *Pro Hac vice*
Mark A. Riekhof, #8420
HALL PRANGLE & SCHOONVELD, LLC
136 East South Temple, Suite 2450
Salt Lake City, Utah 84111
Attorneys for Appellant

David A. Cutt
EISENBERG & GILCHRIST, P.C.
215 South State Street, Suite 900
Salt Lake City, Utah 84111
Attorneys for Appellee

IN THE UTAH SUPREME COURT

DENISE STALEY Plaintiff/Appellee, v. NORTHERN UTAH HEALTHCARE CORPORATION, d/b/a ST. MARK'S HOSPITAL Defendant/Appellant	Utah Supreme Court No.: 20080492-SC Trial Court No.: 050916251

BRIEF OF APPELLANT

APPEAL FROM A DECISION OF THE THIRD JUDICIAL DISTRICT COURT HONORABLE KATE TOOMEY

Eric P. Schoonveld, #10900
Jennifer Ries-Buntain, *Pro Hac vice*
Mark A. Riekhof, #8420
HALL PRANGLE & SCHOONVELD, LLC
136 East South Temple, Suite 2450
Salt Lake City, Utah 84111
Attorneys for Appellant

David A. Cutt
EISENBERG & GILCHRIST, P.C.
215 South State Street, Suite 900
Salt Lake City, Utah 84111
Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTION

This Court granted Defendant's Petition for Permission To Appeal An Interlocutory Order under Utah Rule of Appellate Procedure 5(a) on August 20, 2008. (R. V4, 1490).

ISSUE PRESENTED FOR REVIEW

Whether the production of non-party patient medical records ordered by the trial court, without notice to or consent from the non-party patients, violates Utah's physician-patient privilege statute?

STANDARD OF REVIEW

Discovery matters are ordinarily reviewed under an "abuse of discretion" standard, but questions of law decided in the context of discovery will be reviewed for correctness. *Cannon v. Salt Lake Regional Med. Ctr.,* 121 P.3d 74, 76 (Ct. App. Utah 2005). Because both the existence of a privilege and the application of constitutional protections are questions of law, this Court should afford no deference to the district court's conclusions. *Burns v. Boyden,* 133 P.3d 370, 374 (Utah 2006). Likewise, this Court reviews questions of statutory interpretation for correctness, granting no deference to the district court's decision. *Carter v. University of Utah Medical Center,* 150 P.3d 467, 469 (Utah 2006).

RELEVANT STATUTE

The Utah physician-patient privilege, which is embodied in Utah Rule of Evidence 506, states in relevant part:

> (b) General Rule of Privilege. If the information is communicated in confidence and for the purpose of diagnosing or treating the patient, a patient has a privilege, during the patient's life, to refuse to disclose and to prevent any other person from disclosing (1) diagnoses made, treatment provided, or advice given, by a physician or mental health therapist, (2) information obtained by examination of the patient, and (3) information transmitted among a patient, a physician or mental health therapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or mental health therapist, including guardians or members of the patient's family who are present to further the interest of the patient because they are reasonably necessary for the transmission of the communications, or participation in the diagnosis and treatment under the direction of the physician or mental health therapist.
>
> (c) Who May Claim the Privilege. The privilege may be claimed by the patient, or the guardian or conservator of the patient. The person who was the physician or mental health therapist at the time of the communication is presumed to have authority during the life of the patient to claim the privilege on behalf of the patient.
>
> (d) Exceptions. No privilege exists under this rule:
>
> (1) *Condition as Element of Claim or Defense.* As to a communication relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which that condition is an element of any claim or defense, or, after the patient's death, in any proceedings in which any party relies upon the condition as an element of the claim or defense;
>
> (2) *Hospitalization for Mental Illness.* For communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the mental health therapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization;
>
> (3) *Court Ordered Examination.* For communications made in the course of, and pertinent to the purpose of, a court-ordered examination of

the physical, mental, or emotional condition of a patient, whether a party or witness, unless the court in ordering the examination specifies otherwise."

(Utah R. Evid. 506(b) and (c))

STATEMENT OF THE CASE

This is an appeal from the May 20, 2008 Order of the trial court granting Plaintiff Denise Staley's Motion to Compel the production of the complete medical records of six non-party patients who, in addition to Plaintiff, were assigned to Nurse Angela Stallings during the night shift on April 10, 2003 at St. Mark's Hospital ("St. Mark's"). Specifically, the trial court in its order found the following: (1) the Utah physician-patient privilege, as codified in Utah Rule of Evidence 506, does not establish an absolute bar against the disclosure of non-party patient records; (2) the disclosure of non-party medical records is permitted if patient identifying information is redacted and a protective order limits the scope of the disclosure; and, (3) the Plaintiff's need for the non-party patient medical records in this case outweighs the privacy rights and expectations of the non-party patients.

On June 9, 2008, St. Mark's filed a Petition for Permission to Appeal the May 20, 2008 Interlocutory Order ("Petition") in this Court. On August 20, 2008, this Court granted St. Mark's Petition. (R. V4, 1490).

STATEMENT OF FACTS

This is an action by Denise Staley ("Plaintiff") to recover for renal failure that she suffered after undergoing a hysterectomy at St. Mark's on December 10, 2003. Her initial complaint, filed on September 15, 2005, alleged that St. Mark's was negligent in

that it failed to properly monitor Ms. Staley, timely notify Plaintiff's physician (Dr. Jolles)[1] of her symptoms of renal failure, and timely react in response to those symptoms. (R. V1, 1-8).

On August 30, 2007, Plaintiff filed a Motion for leave to file a First Amended Complaint and a Motion to Compel Production of Documents and Witnesses. (R. V1, 252-264). Plaintiff was given leave to file a First Amended Complaint adding the allegation that "St. Mark's was grossly understaffed and lacked adequate nurses and other staff to provide safe and competent care to its patients," which constituted a knowing and reckless indifference toward the safety of its patients entitling Plaintiff to an award of punitive damages. (R. V2, 708). Plaintiff's Motion to Compel sought, in part, the production of all documents which show the total patient count and reflect patient acuity[2] for Floor 4W on April 10, 11, and 12, 2003. (R. V1, 272).

St. Mark's objected to both motions (R. V2, 396-474), explaining that Floor 4W does not keep documentation regarding patient acuity, and that the only way to extrapolate such information would be to produce the medical files of each patient staying on Floor 4W and attempt to develop an acuity assessment from those files. (R. V2, 689-703). St. Mark's further explained that it had already produced the staffing matrix, staffing sheet and patient census for Floor 4W on April 10, 2003. (R. V2, 730). While these documents do not contain information concerning patient acuity, they detail the number of patients receiving care, the number and staff providing care on the floor

[1] The Order dismissing Dr. Jolles was entered on September 26, 2008.
[2] Patient "acuity" refers to the amount of care and monitoring a patient needs for his or her physical condition. (R. V1, 271).

that night, as well as the ratios of patients to staff that determine staffing for that unit at St. Mark's. More specifically, these documents detail that on the night in question there were 6 to 7 nurses[3] and 34 patients on Floor 4W. (R. V2, 682, 754-771). Of the 34 patients, 6 to 7 patients, including Ms. Staley, were cared for by Nurse Stallings during different times throughout the night.

After the motions had been fully briefed, the district court ordered St. Mark's to "review the medical files of [Floor 4W] patients on April 10, 11, and 12, 2003, and, if possible, to draw together data regarding patient acuity and produce a chart reflecting that data." (R. V2, 689-703). The district court explained that, "[s]uch production will not invade the privacy of the other patients, but will provide the Plaintiff with the information needed to assess whether the hospital was under-staffed on the dates in question." (R. V2, 694). The district court also provided that in the event St. Mark's is unable to provide an "acuity chart," it "must produce a succinct statement, made under oath by an appropriate person, concerning how acuity is assessed and communicated between staff on [Floor 4W]." (R. V2, 695).

In response to the district court's order, How-Su Chen, the current manager of the Floor 4W Unit at St. Mark's Hospital, reviewed the medical records of the Floor 4W patients on April 10, 11 and 12, 2003, and provided an affidavit detailing her findings. (R. V3, 813-823). In her affidavit, Ms. Chen explained that staffing on Floor 4W was determined based on a continuing evaluation of multiple factors, only one of which was a

[3] According to the Staff Matrix for April 10, 2003, Nurse Nancy Emero's shift concluded at 11:00 p.m. As a result, the patients assigned to her were then re-assigned to the remaining six nurses on staff.

patient's acuity. (R. V3, 813-823). Ms. Chen also provided the court with a detailed explanation of the acuity assessment process, setting forth the specific steps taken and multiple considerations which determine staffing. (R. V3, 813-823.). Ms. Chen then explained that any attempt to create an acuity chart for purposes of determining whether staffing levels were appropriate, especially years after the fact, would necessarily be "artificial and misleading" as it is impossible to recreate the exact circumstances and considerations involved at the time those decisions were made solely from the patients' medical records. (R. V3, 814). Nevertheless, because she was ordered to do so, Ms. Chen attempted to evaluate the acuity of patients assigned to Nurse Angela Stallings on the night shift of April 10-11 by reviewing their medical charts. Ms. Chen concluded that "[w]hile it is impossible to recreate the specific factors that would have led to the assignment of Ms. Stallings to those specific patients, the condition of those patients was consistent with the expected patients on [Floor 4W]. Their assignment to Ms. Stallings was an appropriate staffing level for a medical/surgical unit." (R. V3, 816).

Plaintiff subsequently requested the medical records of the six non-party patients Nurse Angela Stallings cared for on April 10-11, 2003. On January 18, 2008, St. Mark's filed an Objection to Discovery, arguing that disclosure of the non-party patient medical records, without the non-party patients' knowledge or consent, even with all identification information redacted, violated the Utah physician-patient privilege, and that any information contained in these non-party medical records would be marginally relevant, at best. (R. V3, 889-993).

On May 20, 2008, the Honorable Kate Toomey entered an order granting Plaintiff's Motion to Compel and ordered the production of the complete medical records of the six non-party patients with identifying information redacted. (R. V4, 1216-1237). The trial court's ruling was made without notice to any of the non-party patients whose records were ordered disclosed. (R. V4, 1216-1237).

SUMMARY OF ARGUMENTS

The trial court's ruling is erroneous and should be reversed because (1) the plain language of the Utah physician-patient privilege statute (Rule 506 of the Utah Rules of Evidence) bars disclosure of non-party patient medical records without the knowledge or consent of the patient; (2) Rule 506 provides *no exception* to permit disclosure based on the redaction of identifying information, and this Court has not, and should not, create such an exception where it was not provided by the Legislature and where the effectiveness of redaction is pure speculation and effectively ignores the patients' expectation of and right to privacy in their medical records; (3) St. Mark's has the right to raise the privilege on its patients' behalf; and (4) the evidence Plaintiff seeks is irrelevant, or at best marginally relevant, and is certainly not significant enough to eviscerate the privacy rights of the six non-party patients for a purpose having little or no relevancy to Plaintiff's malpractice action.

ARGUMENT

I. Utah's Physician-Patient Privilege Prohibits Disclosure Of The Non-Party Patient Medical Records Sought In This Case.

A. The Plain Language Of Utah's Physician-Patient Privilege Statute Protects The Six Non-Party Patients' Hospital Medical Records From Disclosure.

It is an undeniable truth that each of the non-party hospital medical records sought in this case contains the very communications that are privileged and protected from disclosure under Utah R. Evid. 506(b), i.e.:

> "(1) diagnoses made, treatment provided, or advice given, by a physician or mental health therapist, (2) information obtained by examination of the patient, and (3) information transmitted among a patient, a physician or mental health therapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or mental health therapist. . . ."

Utah R. Evid. 506(b). Hospital medical records, which contain information regarding diagnosis and information obtained during an examination of a patient, clearly fall within the scope and purpose of the privilege. *See Tucson Medical Center Inc. v. Rowles,* 520 P.2d 518, 520 (Ariz. App. 1974) (hospital records covered by the physician-patient privilege); *Pina v. Espinoza,* 29 P.3d 1062, 1068-9 (N.M. Ct. App. 2001) (medical records which contain communications between physician and patient are within physician-patient privilege); *Davis v. American Home Products Corp.,* 727 So.2d 647, 650 (La. Ct. App. 1999) (hospital medical records presumed to fall within scope of physician-patient privilege); *Newman v. Blom,* 89 N.W.2d 349, 354 (Iowa 1958) (hospital records necessarily fall within scope of physician-patient privilege because "although the physician would not actually testify . . . the privileged matter sought to be barred would

in fact be effectually placed in evidence . . . ."); *Unick v. Kessler Memorial Hospital,* 257 A.2d 134, 136 (N.J. Super. Ct. Law Div. 1969) ("To find that the written hospital records sought by plaintiffs are not covered by the privilege, as an oral communication would plainly be, would be to frustrate the intent of the Legislature in enacting a physician-patient privilege in the first instance.").

As this Court stated recently in *Sorensen v. Barbuto,* 177 P.3d 614 (Utah 2008), "[t]he healthcare fiduciary duty of confidentiality exists to foster appropriate medical treatment of patients *by assuring patients that their honest and complete disclosures of symptoms and medical history to treating physicians will be kept confidential.*" *Id.* at 619 (emphasis added). Obviously, this fundamental purpose of the physician-patient privilege would be "rendered meaningless if it were destroyed the moment that a physician transcribed communications from a patient or knowledge he has obtained from his examination of a patient into hospital records." *See, Tucson Medical Center Inc.,* 520 P.2d at 521.

B. The Utah Physician-Patient Privilege In Utah Rule Of Evidence 506 Contains No Exception For Redaction Of The Patient's Name From The Records Containing All Of Their Protected And Confidential Information.

The trial court's order here effectively sanctions the abrogation of the confidentiality protections of the physician-patient privilege, leaving in its wake a privilege which now only entitles a non-party patient to the right to have their name deleted before their intimate medical records are interjected into a civil lawsuit and subjected to close inspection and analysis by complete strangers, all without the non-

party patients' knowledge or consent. Deletion of the non-party patients' names and other identifying information does not avoid the statutory privilege. Indeed, the court's production order will still give to another person those patients' "diagnoses made, treatment provided, or advice given, by a physician or mental health therapist," "information obtained by examination of the patient," and "information transmitted among a patient, a physician or mental health therapist, and persons who are participating in the diagnosis or treatment" – the very information expressly protected by the privilege. Utah R. Evid. 506(b).

None of the enumerated statutory exceptions apply here to permit the discovery of redacted medical records. Utah R. Evid. 506 (d)(1), (2), or (3). As this Court held in *Burns v. Boyden,* 133 P.3d 370, 377 (Utah 2006), the only exceptions to the physician-patient privilege are limited to those "specifically enumerated" in Rule 506(d). When applying the general rules of statutory construction, this Court has stated that its "primary goal . . . is to evince 'the true intent and purpose of the Legislature [as expressed through] the plain language of the Act,'" *Carter v. University of Utah Medical Center,* 150 P.3d 467, 469 (Utah 2006), by rendering "all parts [of the statute] relevant and meaningful" and avoiding "interpretations that will render portions of a statute superfluous or inoperative." *Id.* This Court should "presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning. We must be guided by the law as it is . . . . When language is clear and unambiguous, it must be held to mean what it expresses, and no room is left for construction." *Zoll & Branch, P.C. v. Asay,* 932 P.2d 592, 594 (Utah 1997). The maxim *expression, unius est*

exclusion alterius, the expression of one thing is the exclusion of another, supports the view that the Legislature intended to limit the exceptions to those specifically enumerated. *See Field v. Boyer Co., L.C.,* 952 P.2d 1078, 1086-87 (Utah 1998); 2A Norman J. Singer, Statutes and Statutory Construction §§ 47:23-25 (2000).

In *Baker v. Oakwood Hospital Corp.,* 608 N.W.2d 823 (Mich. App. Ct. 2000), the Michigan Appellate Court vacated the trial court's order compelling discovery of redacted non-party patient records on the ground that, as here, the statute, as written, does not make an exception for redacted medical records. *Id.* at 475. The *Baker* court reasoned that "[w]hen statutory language is clear and unambiguous, we must honor the legislative intent as clearly indicated in that language." *Id.* This rationale squarely applies to Rule 506 as interpreted in *Burns*. *See also, C.T. v. Johnson,* 977 P.2d 479, 481(Utah 1999) ("We presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning.")(internal citations omitted).

Thus, although the district court noted the "two major schools of thought"[4] among the several states as to whether redaction of a patient's name is sufficient to permit the disclosure of the private and confidential information contained in that patient's medical records, none of the cases permitting disclosure were interpreting Utah Rule of Evidence 506 and the "specific enumeration" requirement for exceptions to the Rule set forth in *Burns*. Regardless of the rulings in other states on the issue, this Court should not create

[4] For a compilation of the cases from sister states, see St. Mark's Petition for Permission To Appeal, at pgs 5-6.

a new exception to Rule 506 where the Utah Legislature has enumerated several specific exceptions, none of which includes an exception permitting disclosure of redacted medical records.

Moreover, not only does the production of redacted records violate the statute, Plaintiff provided no evidence that redaction would actually protect the non-party patients' privacy interests. As the courts barring disclosure of non-party patient medical records have recognized, even if the names, addresses and phone numbers and other "demographic" information is redacted, the information containing the history of the patient's prior and present medical conditions, treatment and diagnoses could reasonably be used to identify the individual and therefore, redaction does not adequately safeguard their confidentiality. *See Ekstrom v. Temple,* 197 Ill. App. 3d 120 (2d Dist. 1990) (deletion of patient identifying information may not sufficiently protect the confidentiality to which the non-party patients are entitled); *Parkson v. Central DuPage Hospital,* 105 Ill. App. 3d 850, 855 (1st Dist. 1982) ("Whether the patients' identities would remain confidential by the exclusion of their names and identifying numbers is questionable at best."); *Wozniak v. Kombrink,* 1991 WL 17213 (Ohio App. Ct. 1991) (physician-patient privilege barred disclosure of non-party patient medical records, even with identifying information redacted, because risk of disclosing a patient's identity could not be entirely eliminated through redaction of identifying information).

C. St. Mark's Has The Right To Assert The Privilege On Its Non-Party Patients' Behalf.

Hospitals have standing to assert the physician-patient privilege on behalf of their patients. *See Tucson Medical Center Inc. v. Rowles,* 520 P.2d 518, 523 (Ariz. Ct. App. 1974); *Parkson v. Central DuPage Hospital,* 435 N.E.2d 140, 142 (Ill. App. Ct. 1982); *Unick v. Kessler Memorial Hospital,* 257 A.2d 134, 137 (N.J. Super Ct. Law Div. 1969)

Burns v. Boyden, 133 P.3d 370 (Utah 2006) is not to the contrary. In *Burns*, this Court held that the plaintiff-physician in that case, charged with insurance fraud, was not entitled to the presumption that he had authority to claim the physician-patient privilege on behalf of his patients because clear evidence demonstrated that he was raising the privilege, not to protect his patients, but rather to shield himself from a criminal investigation. *Burns,* 133 P.3d at 379. This Court held it would not permit physicians "to shield their fraud through the privilege" or to use their patients as "tools in perpetuating the fraud," further noting that "it is doubtful that patients have any expectation that the privilege would shield their records from law enforcement officials in a case like this." *Id.*

No such evidence and no such policy concerns are present here. St. Mark's is raising the privilege on behalf of the non-party patients who have no notice of this proceeding and are not present to raise it on their own behalf. Indeed, the evidence here is that a failure to enforce the privilege could be helpful to St. Mark's defense. *See* discussion of How-Su Chen's conclusions about patient acuity and staffing after the trial court ordered her to review the non-party patient records, Statement of Facts, *supra.* Nor

is there any basis to conclude that any of the non-party patients would expect the private, privileged and confidential information in their medical records to be revealed to attorneys, parties, witnesses or juries in a medical malpractice case in which they are not involved and about which they had no notice or knowledge. Nor is there any doubt that Plaintiff seeks precisely such confidential and private information. In Plaintiff's Answer to St. Mark's Petition for Permission to Appeal, Plaintiff specifically enumerates the precise and detailed information that she seeks to obtain and use concerning each of these non-party patients:

1. Admission history and physical;
2. Medication administration records for the Subject Shift and the prior shift;
3. Nursing notes for the Subject Shift and the prior shift;
4. Records of all physician consults conducted within 24 hours of the Subject Shift; and
5. Discharge summaries.

(Plaintiffs' Answer to St. Mark's Petition for Permission to Appeal, at pg 6.)

Again these categories of information would necessarily contain the "diagnosis made, treatment provided or advice given," and "information obtained by examination of the patient," and "information transmitted among a patient, a physician or mental health therapist, and persons who are participating in the diagnosis or treatment" – in other words, the very matters protected by Rule 506(b).

II. The Plaintiff Has Failed To Demonstrate That Her Need For Non-Party Patient Medical Records Outweighs The Non-Party Patients' Privacy Interests.

Plaintiff has urged that her need for the non-party records "far outweighs any concerns regarding patient confidentiality." Pl. Ans. to St. Mark's Petition for Permission to Appeal, at 15. But even assuming "need" were ever sufficient to overcome such a fundamental privilege – and it should not be – this is not such a case. At the heart of Plaintiff's request for the six non-party patient medical records is her mistaken belief that without this information, she is unable to determine those patients' acuity levels, and without an understanding of those patients' acuity levels, she is prevented from evaluating whether "Angela Stallings had too many patients. . . ." *Id.*

Plaintiff's purported need for the non-party patient medical records is misplaced for three reasons:

- First, because St. Mark's has admitted responsibility for the allegedly negligent acts of its nurses, there is no legal basis or reason for Plaintiff to assert a separate "negligent staffing" claim.
- Second, whether Nurse Stallings was assigned too many patients is irrelevant for purposes of establishing whether St. Mark's breached the standard of care owed Plaintiff.
- Third, even if Plaintiff's "negligent staffing" claim is not duplicative and derivative of her negligence claim based on the acts/omissions of Nurse Stallings, St. Mark's has already provided Plaintiff with the information establishing staffing levels during the relevant period.

A. Plaintiff's "Negligent Staffing" Claim Is Duplicative And Unnecessary.

Plaintiff's claim that the non-party patient medical records are necessary to evaluate whether Nurse Stallings was assigned too many patients is misplaced. St. Mark's has already admitted that Nurse Stallings is its agent/employee. Because St. Mark's has already admitted its responsibility for the acts/omission of Nurse Stallings in her care of Plaintiff, there is no basis for Plaintiff's "understaffing" claim against St. Mark's. *See Thompson v. Northeast Ill. Reg. Commuter R.R. Corp.,* 854 N.E.2d 744 (1st Dist. 2006) (if it is not disputed that the employee's negligence is to be imputed to the employer under the doctrine of *respondeat superior*, then the cause of action for corporate or institutional negligence is duplicative and unnecessary. To allow both causes of action to stand would allow the jury to assess or apportion the principal's liability twice.).

The reason for this rule is apparent here. If Plaintiff fails to establish St. Mark's nursing staff, including Nurse Stallings, was negligent in its care and treatment of Plaintiff, her claim for negligent staffing will necessarily fail as well. *See Garland Community Hosp. v. Rose,* 156 S.W.3d 541, 546 (Tex. 2004) (institutional negligence claim against a hospital is "inextricably intertwined" with and "derives from" alleged negligent treatment by physician, and thus "without negligent treatment, [an institutional negligence] claim could not exist"); *Taylor v. Cabell Huntington Hospital, Inc.,* 538 S.E.2d 719, 725 (W.Va. 2000) ("While the appellant may be able to show that the hospital breached its duty to supervise Nurse Grim, absent a showing of negligence by

Nurse Grim, the appellant is unable to show that the hospital's negligence proximately caused her injury."); *Frigo v. Silver Cross Hosp. and Med. Ctr.,* 876 N.E.2d 697, 722 (1st Dist. 2007) (citing cases for proposition that in an institutional negligence case if the physician involved was not negligent, then the hospital's alleged negligence in issuing him credentials "could not be a proximate cause of [plaintiff's] injuries"); *Benedict v. St. Luke's Hospitals,* 365 N.W.2d 499, 504-05 (N.D. 1985) (trial court's failure to properly instruct jury regarding hospital's liability for negligent staffing of its emergency room was harmless error where the jury found that neither emergency room physician nor plaintiff's personal physician, with whom he conferred, acted negligently); *Beavis ex. rel. Beavis v. Campbell County Mem. Hosp.,* 20 P.3d 508, 515-16 (Wyo. 2001) (hospital was not liable for negligent hiring of staff member who administered intramuscular injection to minor patient, nor was physician liable for failing to train or supervise said staff member, as jury found in separate trial that staff member was not negligent in administering injection); *Humana Medical Corporation of Alabama v. Traffanstedt,* 597 So.2d 667, 669 (Ala. 1992) (verdict against hospital for negligent supervision of physician who rendered treatment to plaintiff was inconsistent with verdict in favor of physician).

In her Answer to St. Mark's Petition, Plaintiff cites *Clover v. Snowbird Ski Resort,* 808 P.2d 1037, 1048 (Utah 1991), in support of her claim that she is not precluded from asserting her "negligent staffing" claim against St. Mark's. Plaintiff's reliance on *Clover* is misplaced. In *Clover*, the defendant ski resort urged that one of its employees was <u>not</u> acting within the course and scope of his employment at the time of a skiing accident

wherein plaintiff was injured. It was in this context that this Court stated that "[r]egardless of whether an employer can be held vicariously liable for its employee's actions under the doctrine of respondeat superior, an employer may be directly liable for its own negligence in hiring and supervising employees."

The critical distinction between *Clover* and the instant case is that, unlike St. Mark's, the ski resort denied respondeat superior responsibility for its employee's alleged negligence. Thus, the plaintiff was still entitled to pursue a claim for negligent training and supervision. In contrast, here St. Mark's has already admitted its respondeat superior responsibility for the actions of its employees, including Nurse Stallings. Thus, if Plaintiff proves that Nurse Stallings was negligent in her monitoring and reporting of Mrs. Staley's conditions, St. Mark's will admittedly be liable for that negligence. Conversely, if Plaintiff fails to prove Nurse Stallings was negligent, her "negligent staffing" claims would necessarily fail as well. Certainly, such a duplicative and unnecessary claim does not afford a proper basis to violate the physician-patient privilege set forth in Rule 506.

B. The Non-Party Patient Medical Records Are Not Relevant To Plaintiff's Underlying Negligence Claim.

Nor are the non-party patients' records relevant to Plaintiff's claims that Nurse Stallings was negligent. St. Mark's has not claimed that Nurse Stallings was prevented from attending to Plaintiff because she was too busy with other patients who were in more serious condition. Thus, the only relevant issue is whether Nurse Stallings' monitoring and reporting of Plaintiff's condition fell within the standard of care. That

determination does not require an examination of the intimate and personal medical records of any non-party patients, but rather requires an examination of Plaintiff's own medical records, the testimony of Nurse Stallings and others involved in Plaintiff's care and expert testimony as to what the standard of care required. *See e.g., Roe v. Planned Parenthood Southwest Ohio Region,* 878 N.E.2d 1061, 1068 (Ohio Ct. App. 2007) (non-party patient medical records irrelevant to establish whether defendant violated Ohio law in treatment of minor).

C. St. Mark's Has Already Produced An Abundance Of Evidence Relevant To The Staffing Issue.

Even assuming *arguendo* that Plaintiff's belated negligent staffing allegations properly allege a separate and cognizable cause of action – they do not – Plaintiff has unfettered access to other evidence directly relating to the issue of staffing on 4W on April 10, 2003 – including the charge reports, patient census information and staff matrix previously provided to Plaintiff. These materials provide the clearest and most accurate picture of staffing on April 10, 2003. Therefore, Plaintiff already has the relevant information necessary to accurately assess the nurse to patient ratio on the night in question without impinging upon the privacy rights of any non-party patient, thereby eviscerating any need for the production of non-party patient medical records.

A similar scenario occurred in *Yoe v. Cleveland Clinic Foundation,* 2003 WL 549923 (Ohio Ct. App. 2003). There, despite being provided with the Clinic's Operating Room Schedule for the day in question, the plaintiffs sought production of non-party patients' medical records in an effort to prove the defendant physician was operating on

more than one patient simultaneously, thus breaching the standard of care owed to the plaintiff. The Ohio Court of Appeals held that plaintiffs failed to demonstrate that their need for the non-party patients' records outweighed the non-party patients' privacy interests, and upheld the trial court's denial of their request. The court reasoned that the plaintiffs had access to information in support of this theory of the case from sources other than non-party patient medical records, as well as an opportunity to cross-examine relevant witnesses regarding the defendant physician's whereabouts during the day in questions. *Id.* at 3.

Like in *Yoe*, Plaintiff here has access to a myriad of information concerning the staffing on 4W from many sources other than the non-party patients' medical records, without impinging upon the non-party patients' privacy rights protected by Rule 506.

CONCLUSION

For the reasons set forth herein, this Court should hold that the Utah physician-patient privilege bars any disclosure of the contents of the six non-party patient medical records at issue in this case.

Respectfully submitted,

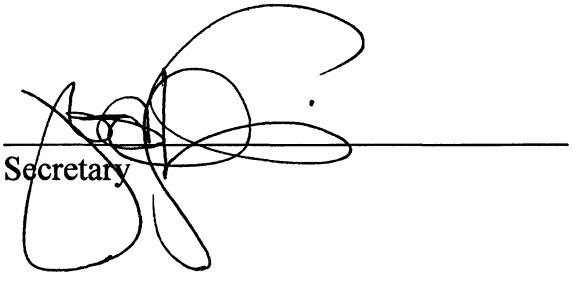
HALL PRANGLE & SCHOONVELD, LLC

One of the attorneys for Northern Utah Healthcare Corp. d/b/a St. Mark's Hospital

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLANT** was mailed, postage prepaid, this 29th day of October, 2008, to the following:

David A. Cutt
EISENBERG & GILCHRIST, P.C.
215 South State Street, Suite 900
Salt Lake City, Utah 84111
Attorneys for Plaintiffs



Secretary